The Evolution of Tort Law in Taiwan: A Doctrinal-Economic Interpretation

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1. INTRODUCTION

Taiwan's tort law, as a civil law system, comprises general provisions in the Civil Code and special statutes concerning liability for damages. Article 184 of the Civil Code provides that a person who is at fault of infringing another person's rights, or acting against good morals, or violating protective laws, is liable for the damage. The provisions from Article 185 to Article 191-3 are concerned with some forms of vicarious liability and strict liability. The scope of liability, according to Article 213 of the Civil Code,[1] is restoration of status quo prior to the injury, i.e., the compensation principle. In the case of damaged non-pecuniary interests that cannot be restored to the status quo ante, Articles 194[2] and 195[3] of the Civil Code give the injured a right to claim from the injurer pain and suffering damages. Statutes, such as the Consumer Protection Law, have been enacted to impose some form of strict liability on injurers. Like most modern civil law systems (for the German case, see Zimmermann 2005, p.

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[1] The article reads as follows: "I. Unless otherwise provided by the act or by the contract, a person who is bound to make compensation for an injury shall restore the injured party to the status quo before the injury. II. If the restoration of the status quo ante shall be paid in money, interest shall be added from the time of the injury. III. Under the circumstances of the first paragraph, the creditor may claim the necessary expenses for restoration instead of the restoration."

[2] The article reads as follows: "In case of death caused by a wrongful act, the father, mother, sons, daughters and spouse of the deceased may claim for a reasonable compensation in money even if such injury is not a purely pecuniary loss."

[3] The article reads as follows: "I. If a person has wrongfully damaged to the body, health, reputation, liberty, credit, privacy or chastity of another, or to another's personality in a severe way, the injured person may claim a reasonable compensation in money even if such injury is not a purely pecuniary loss. If it was reputation that has been damaged, the injured person may also claim the taking of proper measures for the rehabilitation of his reputation. II. The claim of the preceding paragraph shall not be transferred or inherited, except a claim for compensation in money has been promised by contract or has been commenced. III. The provisions of the preceding two paragraphs shall be mutatis mutandis applied when a person has wrongfully damaged to another's status based on the relationship to their father, mother, sons, daughters, or spouse in a severe way."

24-27), jurists (see Chapter 8) and courts (Wang 2015, p. 5) have also played a significant role in the development of tort law in Taiwan.

To economically assess Taiwan tort law, current standard economic theories of tort law, however, are defective because they are regulatory deterrence-based. Current standard economic theories (see for example Brown 1973; Landes and Posner 1987; Shavell 1987) have modelled tort liability as giving people incentives to raise their capability of reducing risks by imposing liabilities for the damage as sanctions. These models do not fit with the *ex post* essence of compensation in tort law. Tort liability is about allocating risks, not reducing risks, although a correct allocation of risks would necessarily lead to a reduction of risks (Section 5 of this Chapter). Due to the high transaction costs arising from accidents, tort law as default rules would decide whether the injurer is responsible or not once the accidents occur. The damage, as Ronald Coase (1960) pointed out, is reciprocal. Therefore, according to the Hand formula (United States v. Carroll Towing Co., 159 F. 2d 169 [2d Cir. 1947]), the injurer would not be liable for damage if he would have lost more than he would have reduced the expected loss if he had not taken the action. This formula would *ex ante* benefit both the injurer and the injured—that is why negligent torts liability, embodying the Hand formula, is a set of default rules!

The Hand formula represents an implicit contract (Cheung 2014, p. 815) made by the injured and the injurer. In the formula B<PL, because a claim for liability can only be initiated after the damage has been done, B represents the interests that cannot be realized if the injurer does not take the action, while PL stands for the expected amount of losses that can be reduced if the injurer does not take the action. This means that the more risky the activities the injurer engages in, the more likely the injurer would be liable for the damage. The robustness of the Hand formula, however, needs a subjective dimension—negligence as a state of mind, i.e., the failure of

recognizing the recognizable. The calculation of this formula should be recognizable to the injurer otherwise it cannot be a norm guiding people's actions. The survival nature of human action dictates that the more risky the activities are, the more recognizable they are. This subjective understanding of the Hand formula would prevent tort liability from being seen as an instrument to deter people's actions and thus would connect tort law with contract law and would distinguish tort liability from regulatory fines and criminal sanctions. Tort law, as a part of private law, takes advantage of the decentralized nature of societal knowledge while unintentionally improving the welfare of society.

Based on this economic reasoning, Taiwan's tort law will be examined in this chapter. Firstly, the fault principle will be explored. The objectification of negligence, the dualism of the negligence rule and strict liability, and the expansion of liability via violations of protective laws are the specific issues to be addressed in Section 2. Section 3 will clarify the confusion concerning tort liability and contractual liability. The regulatory deterrence thesis of tort liability renders contractual liability almost impossible and would thus destroy market order. Section 4 will fit tort liability into the context of the entire legal system, including property law, insurance law, and criminal law. Again, the regulatory deterrence thesis of tort law does not fit into the legal system. Section 5 will demonstrate why tort law is private law and how tort law unintentionally improves social welfare. The final section is the conclusion.

2. THE FAULT PRINCIPLE

2.1. Objectification of Negligence?

There are three categories of general tort in Taiwan: infringement of rights, acts against good morals, and violation of protective laws (Taiwan Supreme Court 2011 Taishangzi 1314 decision). Article 184 (I) of the Civil Code provides: "A person who,

intentionally or negligently, has wrongfully damaged the rights of another is bound to compensate him for any injury arising therefrom. The same rule shall be applied when the injury is done intentionally in a manner against the rules of morals." Article 184 (II) further provides: "A person, who violates a statutory provision enacted for the protection of others and therefore prejudice to others, is bound to compensate for the injury, except when no negligence in his act can be proven."

Infringement of rights is the most general category of torts. Taiwan's courts and legal theorists have adopted a three-phase analysis to apply this general clause of tort law (Wang 2015, p. 113). They are: first, the fact that a right was infringed has to be found; second, there must be no negative factors to excuse this infringement; third, the injurer's intention or negligence has to be found. This is an outdated framework transplanted from German law (Markesinis and Unberath 2002, pp. 79-83). The problem concerned is the wrongful consequence approach in phase 2, which is not just purely a theoretical dispute with the wrongful conduct approach, as Markesinis and Unberath (2002, p. 81) said. This wrongful consequence approach would exclude the calculation of the Hand formula from determining wrongfulness of the injurer's act and thus defer the calculation to phase 3 and objectify the negligence. Consequently, the key role of negligence as a state of mind in the development of private law has been lost.

Take as an example of how to determine the standard of negligent conduct for the less capable driver, such as the near-sighted or the elderly. If the less capable driver hits a person, in the current framework, he would be judged as infringing on another's rights with no excuse for the wrongfulness and then the question is whether he is negligent or not. Due to the lack of calculation of the Hand formula in phase 2, the calculation thus has to be done in phase 3, which was originally reserved for determining whether or not the calculation (risk) was foreseeable to the injurer.

Therefore, the calculation of the Hand formula takes over the foreseeability in phase 3. Negligence loses its cognitive characteristic and becomes objectified. Usually, driving capability becomes the standard of negligent conduct. According to the standard, if a normal driver is liable for the injury, a less capable driver would definitely be liable too. However, this conflicts with the spirit of negligence rules, which would not impose liability on people whose compliance with the standard is beyond his capability.

The correct analysis should be as follows: the less capable driver is a more dangerous driver engaging in a riskier activity. Under the Hand formula B<PL, PL is higher for the less capable driver, meaning that if he drives slower or if he does not drive at all, he would reduce more risks than normal drivers would. Assuming that the value of driving is the same for all drivers, B (the benefits that the driver forgoes by driving slower or not driving) is equal for all drivers. Therefore, it is more likely for B<PL to hold true for less capable drivers, meaning that they would be more likely to be found wrongful. Finally, assuming that less capable drivers have the same cognitive capacity to recognize risks as normal drivers, negligence as a state of mind or foreseeability becomes a nonissue, and thus less capable drivers would be more likely to be held liable for the injury. In determining wrongfulness, the less capable driver has a higher rather than a lower standard of negligent conduct. Negligence rule does not impose a standard with which the less capable driver cannot comply, as the objectified negligence thesis would imply.

In the current economic analysis of tort law, negligence has also been objectified. On the law side, in contrast to Taiwan's tort law that consists of separate elements for wrongfulness and negligence, negligence rules are independent types of torts in common law. On the economic side, liability as a regulatory instrument rather than as a means for compensation dominates the law and economics scholarship. In the

example of the less capable driver, when calculating the standard of negligent conduct, Landes and Posner (1987, pp. 123-31) and Shavell (1987, p. 73-77) would assign more costs to less capable drivers than to normal drivers due to the former's physical "difficulties" to prevent the accidents and therefore give less capable drivers a lower standard of negligent conduct.[4] Both Landes and Posner (1987) and Shavell (1987) know the absurdity of this calculation. Landes and Posner (1987) resort to arguing that a higher standard would save court costs due to the information problem the courts would face in concrete cases. This cannot be right, however. The information costs might be high when distinguishing among the same category of drivers while the information costs would be low when distinguishing between the aged or near-sighted drivers from the normal ones. Shavell (1987) says that less capable drivers derive less benefit from driving, so a higher standard would deter their engaging in the activities in the first place. This is a big if. The theories of Landes and Posner (1987) and Shavell (1987) are *ad hoc* at best.

There is a reasonable person standard in common law which would not allow less capable injurers to be excused from tort liability. This standard has been said to be objective to the extent it might exclude any possibility of subjective standard of negligent conduct (for example Ben-Shahar and Porat 2016). This is a misunderstanding of the standard. Here is the oft-quoted saying of Oliver W. Holmes (1881, p. 108): "*The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men.*" This saying, however, only means that those individuals' elements cannot be made excuses for relieving the injurer's liability. It is not obvious, and probably quite wrong, to infer that the less temperamental, the less intellectual, or the

[4] In the calculation of the Hand formula B < PL, this means that B is larger for less capable drivers, and therefore they are less likely to be negligent.

less educated the injurer is, the lower the standard the injurer is held to be accountable. Probably only utilitarians such as Landes and Posner (1987) and Shavell (1987) would take this position in the calculation of the Hand formula (see the previous paragraph). Tort law is not utilitarian after all. This is also the reason why they failed to develop a coherent economic theory of tort law. As the driving example shows, the less capable the driver is, the higher the standard of negligent conduct the driver will be held. The standard of negligent conduct could be both "subjective" in the sense of depending on the individual's capability and "objective" in the sense that it distinguishes between the subjective recognition of risks.

Negligence along with intention is a state of mind. Intention requires that the injurer did foresee that the accident would happen because he intended to let it happen. Negligence requires that the injurer should have foreseen but did not foresee that the accident would happen. The foreseeability of the accident depends on its riskiness which then depends on the injurer's taking action with a given physical capability (safety measure) relevant to the accident. The moment at which the less capable driver increases his speed is when he begins engaging in a more risky activity. In other words, if he had slowed down, he would have engaged in a much less risky activity. In the Hand formula B<PL, the expected reduced loss (PL) would be larger for the less capable driver. Under the usual assumption that the benefit enjoyed by driving does not vary with differences in the driver's capability to drive, i.e., B being equal for all drivers, the less capable driver's standard of negligent conduct is higher, meaning that he has to drive at a lower speed limit. At the same driving speed, the less capable driver would be more likely to be seen as wrongful. How about his state of mind? Usually, the capability to drive does not correlate with the capability to acknowledge the fact that the less capable the driver is, the slower he should drive. Therefore, the more risky the activity the injurer engages in, the more likely he would

be negligent and thus liable for damage. The so-called objectified standard of negligence is misleading—actually it is completely wrong. Negligence is subjective, as a state of mind. The requirement of negligence guarantees that the ruled would not be surprised by unforeseeable liabilities. It is for the reason of rule of law that a (subjective) negligence should be required!

2.2. Violations of Protective Laws

According to Article 184 (II) of the Civil Code, a person who violates those laws enacted for protecting another and causes damage to another shall be liable for this damage. This provision expands the protection of tort liability to interests which are not covered by the preceding Article 184 (I). This is so because in the former part of Article 184 (I), the entitlements protected are absolute rights such as rights *in rem* or personal rights; and interests other than absolute rights, according to the latter part of Article 184 (I), could only be protected on the condition that the injurer intentionally takes the action which is against good morals (Taiwan Supreme Court 2000 Taishangzi 2560 decision). This difference in protection of absolute rights and interests makes sense because interests other than absolute rights are usually not foreseeable to the injurer upon his taking concrete actions. The requirement that the injurer must have acted against good morals would further prevent injurers such as competitors in the market from being held liable for the rivals' damage from competition.

Article 184 (II), prior to its 1999 modification, reads as follows: "A person who violates the laws of protecting others shall be presumed negligent." Judging from this text, it would be more appropriate to see this provision as a rule shifting burden of proof among the injurer and the injured rather than a rule declaring that tort is independent. Taiwan Supreme Court, however, in a case (1975 Taishangzi 2263 decision) ruled that the employer, because he did not insure his employees as required

by labor laws, was liable for the damage to the employees on the basis of Article 184 (II). The legislative history of the 1999 modification of Article 184 (II) shows without a doubt that this provision declares violation of protective laws to be an independent type of tort and distinct from infringement of rights and acting against good morals.

Taiwan's courts have sometimes misused Article 184 (II) to bypass the more stringent Article (I) to make the injurer liable for the damage. Firstly, the provisions of the Civil Code cannot be the protective laws of Article 184 (II) as such. In a recent case (2011 Taishangzi 1012 decision), the Taiwan Supreme Court ruled that Article 794 of the Civil Code is the protective law of Article 184 (II), and therefore the injurer was presumed negligent and liable for damage (Chien 2012). Article 794 reads as follows: "In excavating the land or in constructing buildings, the landowner shall not cause the foundations of the adjacent land to be shaken or endangered, nor can he cause any injury to the building or other works of the adjacent land." It is clear that the foundations of the adjacent land, the building, or other works of the adjacent land are the (absolute) rights which are protected under Article 184 (I). Article 794 is only a clarification and does not create the right. If a person kills or hurts another, whether he is liable or not is determined by Article 184 (I), and consequently there is no reason that a building or land should be protected more by Article 184 (II). It is not necessary for a Civil Code to contain a provision such as Article 794. If there is an impending infringement of adjacent land, the landowner thereof can sue for injunction according to Article 767 of the Civil Code.[5] The bad consequence of misapplying this provision can be demonstrated in the case of Taiwan Supreme Court 2001 Taishangzi 26 decision. In this case, the preexisting building actually had been built on a weak

[5] The Article reads as follows: "I. The owner of a thing has the right to demand its return from anyone, who possesses it without authority or who seizes it. Where his ownership is interfered, he is entitled to claim the removal of the interference; and where the ownership might be interfered, he is entitled to claim the prevention of such interference. II. The provision of the preceding paragraph shall apply mutatis mutandis to the rights in rem other than ownership."

ground, and as a result, it was damaged by later development of neighboring land. The court, indeed, did not invoke Article 794 for its judgment. The court must have known that it was the weak ground of the preexisting building rather than the development of neighboring land that was primarily responsible for the damage. The following reasoning of the common law case *Bryant v. Lefever* (4 C.P.D. 172 [1878-1879]) would shed light on this Taiwan case: "It is the plaintiff who causes the nuisance by lighting a coal fire in a place the chimney of which is placed so near the defendants' wall, that the smoke does not escape, but come into the house" (Coase 1988, p. 109).

Secondly, causation is still required for a person to be held liable for violating regulatory protective laws. In the age of the regulatory state, there exist many regulations which are intended to protect the interests of another. Take traffic accidents as an example. If a driver without a driver's license violates traffic regulations, he would not be liable for damage if the damage was not caused by him. Taiwan courts, however, too rigidly apply the traffic rule requiring cars to maintain a safe distance. In one case (1997 Taishangzi 833 decision), Taiwan Supreme Court adhered to this rule and refused to consider the possibility that the injured party suddenly cut into the lane where the injuring party was driving on. The most distorted reasoning arising from this provision was a case (Taiwan Supreme Court 1997 Taishangzi 56 decision) in which a doctor was held liable on the ground that he violated a regulation requiring a written agreement from the patient for surgery, rather than on the ground that he had performed a second surgery without consent in an attempt to cover up the failure of the first surgery. It seems that courts in Taiwan try to be seen as rule-bound without making any value judgments (Chien 2003).

Thirdly, imposition of criminal penalty should not be used as a means of coercing the injurer to compensate the injured. In Taiwan, the victim of a criminal act

can also seek compensation for his damage during the criminal procedure. According to the law of criminal procedure, the plaintiff, usually the prosecutor, has a higher standard of proving the defendant's guilt than in civil cases, i.e., beyond reasonable doubt rather than more likely than not. This difference in standard of proof, however, has been undermined by the addition of civil compensation for damage in the criminal procedure because courts distracted by civil compensation tend to leverage the criminal penalty in coercing the injurer to compensate the injured. This occurs particularly in cases concerning traffic accidents. The courts' decisions show that if the defendant settles with the injured on civil compensation for damage, they would hold the defendant on probation only. This compensation-oriented approach has distorted the law of criminal procedure which was originally enacted for protecting people from being arbitrarily punished.

2.3. Strict Liability

It might seem a little surprising that this subsection titled "Strict Liability" is arranged under the section titled "The Fault Principle". In this subsection, I will argue that strict liability is in essence a kind of negligence liability. As subsection 2.1 shows, the Hand formula of the negligence rule dictates that the more risky the activity the injurer engages in, the more likely the injurer will be held liable for the damage. Thus it can be inferred that the injurer certainly will be held liable when the activity he engages in is extremely dangerous. This is strict liability!

The current economic theories of strict liability, however, are complicated and distorted. The economic theories have modelled strict liability not as a legal doctrine but instead as a decision of the court to hold the injurer liable for the damage. No liability, strict liability, and negligence have been compared on the same level. For example, Landes and Posner (1987, p. 62) have said: "No liability" is a liability rule in a sense—an economic sense—because it affects the incentives of the parties." They

have further said (1987, p.63): “Strict liability is symmetrical with no liability.” While the determination of negligence can result in either liable or not liable for the injurer, this comparison of three “rules” is confusing. If there exists no “no liability” as an independent type of tort, “strict liability” in its opposite sense would not be an independent type of tort either.

Confusing as it might be, the comparison between negligence and strict liability and the choice between the two have been advanced. Firstly, contrary to ordinary impression, strict liability would not lead the injurer to be overcautious by not taking action that he would have taken under the negligence rule (Landes and Posner 1987, p. 64-5). Ironically, this reason would eliminate the most important factor determining the choice of negligence or strict liability in the regulatory deterrence-based model.

Secondly, the costs of administering the negligence rule and strict liability have been compared (Landes and Posner 1987, p. 65). There are two problems here: 1. For the choice of liability rule, using administrative costs as the key factor rather than behavior channeling is incoherent in a regulatory *deterrence-based* model; 2. The comparison of information costs and claim costs would be indeterminate because the higher of the former would favor strict liability while the higher of latter would favor negligence rule.

Thirdly, “strict liability has a larger insurance component” (Landes and Posner 1987, p. 66). This insurance component can be derived without a regulatory deterrence-based model. Furthermore, the negative consequences of insurance such as moral hazard and adverse selection have to be taken into account and thus this component becomes indeterminate.

Fourthly, strict liability would provide “the incentive to avoid accidents by reducing level of an activity rather than by increasing the care with which the activity is conducted” (Landes and Posner 1987, p. 66). However, this claim is only valid on

the condition that negligence liability has been determined based on the level of care without concerning the level of activity. In the real world, this artificial separation of level of care and level of activity is difficult, and probably even impossible. Again, take driving as an example. The driving speed is the standard of negligent conduct. It could be considered level of care. It could also be considered level of activity. A driver could stop driving because of either strict liability or negligence rule. While the separation of level of care and level of activity might be possible in the (*ex ante*) regulatory deterrence-based model, it could not arise in *ex post* tort liability, in which the (level of) activity is the object to be evaluated in the Hand formula.

In Taiwan, strict liability has been regarded as equivalent to outcome liability, meaning that fault is not required for injurers to be liable for the injury. This dualism of liability has caused much confusion in Taiwan tort law. Understood correctly, strict liability is a type of fault liability. As the Hand formula demonstrates, the more risky the activity the injurer engages in, the more likely the injurer will be liable for the injury; therefore when the activity is extremely dangerous, i.e., when P of the Hand formula is close to 1, the injurer almost certainly will be liable for the injury. Article 191-3 of Taiwan Civil Code[6], a general provision of strict liability, was added to the Civil Code in 1999, almost six decades after the Code came into force in 1930, however, it does not cause "flood" of tort litigation as many people feared. This is so because this provision does not create a new tort and only clarifies the general provision of Article 184 of the Code. In common law, although negligence and strict liability are separate and independent types of torts, they are not opposite from each other—the fault principle governs not only negligence but also strict liability.

[6] This article reads as follows: "The person, who runs a particular business or does other work or activity, shall be liable for the injury to another if the nature of the work or activity, or the implement or manner used [is dangerous] to another. Except the injury was not caused by the work or activity, or by the implement or manner used, or he has exercised reasonable care to prevent the injury."

Intentional tort has the same economic structure as strict liability. In the real world, it is impossible to determine whether the injurer is intentional or not. The intention of the injurer has to be inferred from the riskiness of the activities he engages in. Intentional tort means that the injury would not have happened if the injurer had not taken the action on purpose. In the Hand formula, this means that P is close to 1. The more risky the activity, the more likely the injurer would recognize the risk. When P is close to 1, the injurer must have acted intentionally.

3. TORT LIABILITY OR CONTRACTUAL LIABILITY

3.1. Good Samaritan or Not

Whether a person should act like a good Samaritan would further reveal the defectiveness of the regulatory deterrence-based model. Good Samaritan Law requires a person to help someone out of danger if he could easily do so. A regulatory model of tort law would make a person liable if he does not act like a good Samaritan. The reasoning is as follows: in the regulatory model, the difficulties that a person faces are the costs of precaution (B), which is small, while the success rate of help is high, meaning P is high; therefore B<PL is established. This can be illustrated by what Shavell (1987, p. 74) asserts: “Thus, it may be desirable for a young, able-bodied person to clear a sidewalk of ice, but undesirable for an elderly individual to do so.”[7]

In Taiwan tort law, a person who does not act like a good Samaritan is not liable for the damage. This has good reasons. First, how would the person know whether he is in a position to rescue the injured if the injury was not caused by him? In accident cases, it is the riskiness of the activity the injurer engages in which would naturally lead the injurer to recognize the risk. In good Samaritan cases, the “injurer’s”

[7] Usually the law prescribes that the occupier of the house is responsible for keeping the sidewalk in front of the house ice-free (for the German case, see Wang 2015, p.358). On the assumption that the elderly usually are richer and have larger houses than the young, it is the elderly who bear a higher burden of clearing the sidewalk because a larger house usually has a longer sidewalk.

recognition of “risk-reduction” usually has not been taken into account. This would be illegitimate in private law.

Second, the person might believe that someone else would come to rescue and therefore his inaction would not matter in the prevention of the injury. This means that in the Hand formula, P is close to 0 and B<PL would not be established.

Third, the opportunity costs of the rescue for the person might be large, such as having to rush a patient to the hospital for emergency treatment, thus making B large, which makes B<PL harder to be established.

Fourth, imminent danger is often present in these types of situations, making it impossible for the injurer and the injured to conduct transactions with each other, and therefore asymmetric information cannot be eliminated. This means that a person who does not lend his hand in another’s dangerous situation must have good excuses (reasons 1-3), and the court’s intervention on the basis of good Samaritan would always be a mistake.

If a person bears no affirmative duty of the Good Samaritan, he also should not be burdened with a contractual liability deriving from his affairs intervened by another even with benevolence in mind. Indeed, Article 176 (I) of the Civil Code provides: “If the management of the affair is beneficial to the principal and is not against his expressed or presumptive wishes, and where the manager has, for the principal, made necessary or beneficial expenses, or assumed debt, or suffered injury, he is entitled to claim against the principal for the reimbursement of such expenses plus interest commencing from the date of outlay, or the payment of such debt, or compensation for the injury sustained.” This provision explicitly does not grant the intervenor the right to remuneration for his management of affairs even beneficial to the principal.

The reasons for this law are parallel to the ones for the above-mentioned

Non-Good Samaritan. First, remuneration would give a person incentive to intervene in another's affairs even without benevolence in mind. Second, remuneration would give a person incentive to intervene in another's affairs even if he is not the most qualified person to manage the affairs. Third, the person whose affairs have been intervened might have subjective values that deviate from normal. Fourth, a transaction eliminating this asymmetric information does not arise by definition. This means that there will be too many cases of remuneration-based intervention in another's affairs for which the courts are not suited in dissolving the difference between the intervenor and the principal.

On the one hand, the law does not want to encourage frivolous cases of intervention in another's affairs; on the other hand, the law also does not want to discourage benevolent ones that could greatly increases social welfare. Indeed, Article 175 of the Civil Code provides: "If the undertaking of the management of the affair is in order to avert an imminent danger which threatens the life, body or property of the principal, the manager is not responsible for any injury derived from his management, except in case of bad faith or gross negligence." The lower standard of negligent conduct for the benevolent intervenor would clear his concern for unexpected (liability) risks.

3.2. Faults in Contractual Liability

Due to the high transaction costs, the law, depending on whether the injurer engages in risky activities which are beneficial to him or not, prescribes that a benevolent intervenor would bear a lower standard of negligent conduct for liability. Needlessly to say, this autonomous principle would also apply to contexts of contract. Article 220 of Taiwan Civil Code provides: "I. The debtor shall be responsible for his acts, whether intentional or negligent. II. The extent of responsibility for one's negligence varies with the particular nature of the affair; but such responsibility shall

be lessened, if the affair is not intended to procure interests to the debtor." This provision will apply when the contracting parties do not explicitly allocate the risks in the contract. This provision is a restatement of liability rules in torts and for good Samaritans. In good Samaritan cases, no remuneration is "the affair not intended to procure interests to the debtor" of Article 220; the injurer as a good Samaritan would have a lower standard of negligent conduct for liability as Article 175 provides. The structure of this general provision of contractual liability echoes with the structure of tort liability. In tort liability, the more risky the activity the injurer engages in, the higher the standard of conduct the injurer would bear. In contractual liability, the more remunerative the activity the debtor engages in, the higher the standard of conduct the debtor would bear. As the Hand formula shows, the more risky the activity the injurer engages in (i.e., the higher the PL), the higher the unrealized benefits (B) of the injurer has to be in order not to let the injurer be liable for the damage. The purpose of tort liability, however, is to *ex ante* equalize the unrealized benefits (B) and the riskiness of the activity (PL). In contractual liability, this means that the smaller the unrealized benefits (B) are, the lower the riskiness of the activity (PL) the injurer is willing to engage in. This is why in gratuitous contracts and good Samaritan cases the injurer has a lower standard of conduct than the one in torts.

In a recent case (Taiwan Supreme Court 2014 Taishangzi 2070 decision) concerning medical malpractice (Chien 2015b), the Taiwan High Court ruled that doctors are obliged to follow standard medical guidelines *and* perform their contractual duties. The court, however, said that doctor's obligations of performing contractual duties are higher than the level set in the standard medical guidelines. This is odd. In Taiwan, doctors are obliged to treat patients in an emergency without first signing any written contract. In this case, there is no information revealing that the patient has paid a higher than usual price. In addition, Taiwan's National Health

Insurance Program has usually underpaid doctors and hospitals. According to Article 220 of the Civil Code, doctors would be liable for damage based on lower not higher standard of negligent conduct because they derive little benefits from the treatment. However, the Taiwan Supreme Court did not take issue with the Taiwan High Court and remanded it on other grounds.

3.3. Medical Malpractice as Products Liability

Products liability is a contractual liability. Accordingly, the principle of Article 220 of the Civil Code should be applied here. Article 7 of Taiwan's Consumer Protection Law,[8] however, provides that enterprises should be more or less strictly liable for the damage related to the product use.[9] As subsection 3.2 shows, strict liability as contractual liability would mean that the riskiness of the activity engaged by the enterprise should not be too large otherwise there will exist no contract. A unique aspect of the Consumer Protection Law in Taiwan is that it also covers the liability of service providers. In literal terms, medical services would fall under the jurisdiction of this law. Taiwan courts have heavily debated this issue. In the end, the courts concluded that the strict liability provision of the Consumer Protection Law should not apply to medical services (Taiwan Supreme Court 2007 Taishangzi 2738 decision). In this debate, economic analysis of law was even put forward to support the position that strict liability should not be applied.

[8] The article reads as follows: "I. Business operators engaging in the design, production or manufacture of goods or in the provisions of services shall ensure that goods and services provided by them meet and comply with the contemporary technical and professional standards of the reasonably expected safety prior to the sold goods launched into the market, or at the time of rendering services. II. Where goods or services may endanger the lives, bodies, health or properties of consumers, a warning and the methods for emergency handling of such danger shall be labeled at a conspicuous place. III. Business operators violating the two foregoing two paragraphs and thus causing injury to consumers or third parties shall be jointly and severally liable therefor, provided that if business operators can prove that they are not guilty of negligence, the court may reduce their liability for damages."

[9] Article 7-1 further provides, "I. Where business operators allege that when their goods launched into the market or at the time of rendering service were in compliance with the contemporary technical and professional standards, of reasonably expected safety, they are required to produce evidence in support thereof. II. Goods or services cannot be presumed inconsistent with the requirement of safety set forth in the first paragraph of the preceding Article simply because better goods or services are subsequently provided."

Taipei District Court (1998 Suzi 1521 decision) fired the first shot in 2001. The court first argued that the purpose of adopting strict liability is to reduce dangerous activities, in contrast to negligence rule in which its purpose is to increase the level of care of the actors. The court then opined that if strict liability is applied to medical malpractice, then the doctor would reduce his harm-causing activity, meaning that he would adopt defensive medication while forgoing the more suitable treatment such as surgery. The court concluded that this result would not be in the spirit of Article 1 of the Consumer Protection Law, which states, "The Consumer Protection Law is enacted for the purposes of protecting the interests of consumers, facilitating the safety of the consumer life of nationals, and improving the quality of the consumer life of nationals."

The main problem with this reasoning is that in emphasizing the difference between level of activity and level of care, the court ignored the more fundamental difference between contractual liability and tort liability and made the argument circular (Chien 2008). Firstly, as the court said that the purpose of strict liability is to induce the injurer to engage in less dangerous activities rather than increase the level of care, then what is the court's reason of abandoning strict liability in favor of the negligence rule when doctors do forego risky treatments as a response to strict liability? Secondly, if reducing the level of dangerous activities is not the ultimate goal of the law and then why compare strict liability with the negligence rule? Thirdly, if reducing dangerous activities is not the ultimate goal of the law, then strict liability would certainly not be a good rule.

The framework of level of care and level of activity is not a good tool for analyzing tort liability. First of all, level of care and level of activity cannot be meaningfully separated. Again, take driving as an example. Should driving speed, the key variable in determining the driver's responsibility, be considered level of care or

level of activity? Once a speed limit is imposed, the degree of caution of the driver turns into level of care. The driver falling asleep constitutes insufficient level of care. But why does negligence have to be limited to this scope? If the driver increases his speed, his level of activity has increased, and even if he exercises adequate level of care by not falling asleep, he would still be deemed negligent, so why is strict liability even necessary? There are varying standards of negligent conduct for the various types of medical treatment. Once a treatment method is selected, negligence must be determined based on its individual standard. But in an emergency situation, if medication is insufficient and surgery becomes the only option (even if success rate is not 100%) and doctors choose not to do the surgery, they still will be held liable for the injury based on negligence rule regardless of the lower level of care or the lower level of activity.

It is absurd to apply a model based on reducing the level of activity to explain the contractual obligations of medical care, which reduces risks via increasing the level of activity. The inappropriateness of strict liability for medical malpractice is not that it would not decrease or would even increase harm, but that the reduction in risks is not enough. As the court stated, “defensive medical care” is a consequence of the imposition of strict liability—excessive care leading to a portion of cases receiving perfect medical care, but another portion completely barred from receiving any medical care. Cases that receive medical treatment witness reductions in harm, but those that do not receive any medical care do not see reductions in harm. So even though the overall risks may be decreased, on the one hand, the distribution of the reduction is uneven, and on the other hand the reduction is suboptimal compared with negligence rule. This is reflected in the decrease in medical malpractice litigation which some would say that strict liability has achieved its goal of deterrence. This observation is problematic.

The court also tried hard to distinguish between consumer products and medical services, but the criterion it used was misguiding. Use of consumer products and provision of medical care both arise from contractual transactions, so in principle adopting strict liability (outcome liability actually) is inappropriate for both cases. The court was wrong when it argued that in medical care, strict liability is unable to encourage potential victims to increase their level of care to prevent the harm while in consumer products, it can. As long as strict liability (without contributory negligence) is adopted, regardless of whether it is applied to consumer goods or to the provision of medical services, it is never able to encourage potential victims to increase their level of care.

The primary difference between purchase of consumer goods and provision of medical services lies in that preexisting risks of patients would be transferred to doctors if strict liability is adopted. The Hand formula is both a normative criterion determining liability and a positive measure predicting people's behavior. In the case of medical services, P of the formula is large. Therefore B has to be large to offset large P. This means that patients have to pay a high treatment fee to compensate doctors for accepting risks transferred from patients, otherwise doctors would not provide services in the first place. By contrast, the lack of preexisting risks in the purchase of consumer goods does not affect P. Therefore, strict liability (outcome liability) applied in this case would not do as much harm in product markets as it would to medical services.

4. THE LAW AS A SYSTEM

4.1. Rights *in rem* v. Rights *in personam*

The information-based interpretation of negligence also sheds light on the issue concerning the nature of rights *in rem*, which have priority over rights *in personam* when the two rights are in conflict. Taiwan's Constitutional Court, in Interpretation

No. 349, overrode a precedent issued by the Taiwan Supreme Court, opining: "Legal actions under the Civil Code can be classified as actions *in personam* and actions *in rem*. Unless specifically provided by the law, the former shall have legal effect on persona certa while the later shall, upon notice being given to a third party through means of public announcement, have legal effect on any third party. Hence, means of public announcement, by delivery for movables and by registration for immovables, are essential conditions for the acquisition, forfeiture and alteration of rights and interests. This is to protect bona fide third parties. In the event that the third party actually received or ought to have received notification of the contract, its terms shall have legal effects on the third party notwithstanding that the contract may be in personam."

This is so because rights *in rem* get the *in rem* characteristic from their publicity by possession, recordation, or registration, while rights *in personam* cannot be easily recognized by the public (Su 2010; Chien 2011). Compared to tort liability, the priority of rights *in rem* means the injurer—the holders of rights *in rem*—is not liable for the damage—the inferiority of rights *in personam*. In the calculation of the Hand formula, this means that P is very small—it is very difficult for the holders of rights *in rem* to avoid the damage because rights *in personam* have not been publicized—therefore B<PL cannot be established. Conversely, from the perspective of holders of rights *in personam*, the Hand formula would also show that the holders of rights *in personam* are (contributorily) negligent and thus cannot claim superiority over rights *in rem*. It is very easy for the holders of rights *in personam* to avoid the damage because rights *in rem* are publicized—P of the Hand formula is very large and therefore B<PL would be established. In the case of creating fraudulent rights *in personam* with the intent to dilute the rights *in rem* concerned, P is 1 and therefore B<PL certainly will be established.

4.2. Tort Liability and Insurance

In standard law and economics, the goal of tort law is to deter people from engaging in activities that externalize their associated costs. Insurance for liability thus would frustrate the deterrence goal. Furthermore, according to the deterrence theory of tort law, there would be no accidents that are not cost-justified because people would fully comply with the legal standard and therefore third party liability insurance would not be needed. The fact that there is a demand for liability insurance indicates that the benefits the insured receives from engaging in the activity must be larger than the loss that he would have to compensate for via tort liability.

In Taiwan, the Compulsory Automobile Liability Insurance Act was "specially adopted in order to ensure prompt basic coverage for the injured parties in automobile traffic accidents that result in injury or loss of life and to maintain roadway traffic safety", as Article 1 of the Act declared. Article 29 (I)[10] also shows that the legislators of the Act did know that the liability for intentional torts or gross negligence cannot be insured otherwise people would have no incentive to engage in only those activities that are reasonably risky. Intentional torts and gross negligent conducts have to be deterred and cannot be insured while negligent conducts should be allowed and can be, and sometimes even have to be, insured.

4.3. Tort Liability and Criminal Sanctions

The Taiwan Criminal Code could further illuminate the nature of tort liability as a compensatory scheme rather than deterrence-based. Article 12 of the Criminal Code

[10] The article reads as follows: "When an automobile traffic accident involving an insured automobile occurs as a result of any of the following behaviors on the part of an insured, the insurer shall still bear liability for payment of insurance benefits as provided herein, provided that the insurer may be subrogated to the claimant's right of claim against the insured, within the amount of benefits paid: 1.Was driving the automobile after ingesting alcohol or another similar substance and had a breath or blood alcohol concentration exceeding the standard set by any act or regulation governing road traffic. 2. Was driving after having taken intoxicants, hallucinogens, narcotics, or other similar controlled substances, as verified through a test. 3. Caused it through a deliberate act. 4. Was engaging in a criminal act or evading lawful arrest. 5. Was driving an automobile in violation of Article 21 or 21-1 of the Act Governing Management of Roadway Traffic and Administration of Sanctions."

provides: “I. A conduct is not punishable unless committed intentionally or negligently. II. A negligent conduct is punishable only if specifically so provided.” Indeed, the provisions of the Criminal Code concerned with punishing conducts that cause damage to another’s pecuniary interests, i.e., Articles 320 to 363, do not specifically provide that negligent conducts are punishable. The unpredictability of the intentional harm which depends on the injurer’s internal will unobservable from outside is the rationale of criminal law (Fletcher 1985, p.925). Negligence as a state of mind by definition is not arbitrary as intention, meaning P in the Hand formula not close to 1 as intention is (see subsection 2.3), therefore, criminal punishments should not apply to negligent conducts. Whereas for non-pecuniary interests which inherently cannot be fully compensated by monetary damages (Geistfeld 2011), the injurer even only with negligence thus has to be deterred by the law.

Furthermore, the fact that the standard of proof is higher in criminal cases than in civil cases also weakens the thesis of tort liability for the purpose of deterrence. The higher standard of proof means that the P in the Hand formula has to be higher otherwise the conducts cannot be proven as negligent. It can be inferred that only conducts of intention or gross negligence can be punishable in criminal law. Ordinary negligent injurers would not be liable for criminal sanctions but only for civil damages.

As Calabresi (1997, p.2204) said that one of the reasons why he wrote the now classical article “A View of Cathedral” (Calabresi and Melamed 1972) is that the economist Gary Becker did not distinguish criminal punishment from civil damages. Calabresi and Melamed’s putting tort liability into the category of liability rules, however, is a mistake. The characteristic of Calabresi and Melamed’s liability rules is that the injured would lose his entitlements without his consent if the injurer would pay a price which is determined by a third party or the injurer himself. Eminent

domain is a typical case. Tort liability is not like eminent domain. The outcome liability which would be a Calabresi and Melamed's liability rule is never the principle for tort liability. In tort liability cases, the first priority of the courts is to determine whether the injurer is negligent and liable for the damage. Tort liability as a Calabresi and Melamed's liability rule would gloss over the most important element of tort liability—negligence. Negligence liability is not an instrument or an incentive which can be manipulated by the courts to achieve some goals outside the injurer and the injured. The courts have to determine the tort liability based on negligence rules which are default rules allocating the risks between the injurer and the injured. Calabresi and Melamed (1972) may have saved tort liability from degenerating into criminal sanctions, but they put tort liability into another directive category of rules and thus the autonomous essence of tort liability has been buried.

5. THE INVISIBLE HAND OF TORT LIABILITY

From an economic perspective, the purpose of tort law is to minimize the added amount of precautionary costs and expected loss, as the Hand formula shows. The standard economic analysis, however, has adopted an *ex ante* regulatory deterrence-based model for the *ex post* tort liability. In this *ex ante* regulatory model, precautionary costs are the injurer's expenses to reduce risks associated with physical challenges or risks. In the case of driving, for example, weak-sighted drivers have higher precautionary costs than normal drivers do; in the calculation of the Hand formula, weak-sighted drivers therefore have a lower standard of conduct for liability. This is absurd, obviously. Precautionary costs associated with reduced physical capabilities would make sense only if the goal of the law is to reduce risks by *ex ante* requiring that all drivers should have some level of eyesight. This means that the *ex ante* regulatory model could not apply to those actually occurring in concrete accidents because the information structure has changed through time (O'Driscoll and

Rizzo 1996). The regulatory deterrence-based model therefore does not fit with *ex post* tort liability law.

Hayek (1948, p. 77) pointed out that "The peculiar character of the problem of a rational economic order is determined precisely by the fact that the knowledge of the circumstances of which we must make use never exists in concentrated or integrated form but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess." The risks with which tort liability deals are a kind of this dispersed knowledge. Again, in the example of driving, whether the driver is weak-sighted or not *per se* becomes irrelevant because the driver can drive slower to compensate for his reduced capability, or because the benefits of this specific driving activity are larger than normal, such as in the case of getting a patient to the hospital. Indeed, Article 150 of Taiwan Civil Code excuses the injurer's liability for damage if the injurer's action is intended to avoid the imminent danger to life, body, freedom or property of himself or others.[11] A regulatory interpretation of tort liability would lead to inefficiency in the real world or to *ad hoc* theories explaining nothing, such as ones offered by Landes and Posner (1987) and Shavell (1987).

Most importantly, although the *ex post* nature of tort liability would not directly address raising incentives for people to increase their capabilities and reduce risks as standard economic analysis of tort law does, there is a built-in mechanism in tort liability to induce people to take such actions. The core of tort liability is that the less capable the injurer is, the more likely he will be liable for damage. Therefore, people

[11] The article reads as follows: "I. A person acting to avoid an imminent danger menacing the life, body, liberty or property of himself or of another is not liable to compensate for any injury arising from his action, provided the action is necessary for avoiding the danger and does not exceed the limit of the injury which would have been caused by the said danger. II. Under the circumstances specified in the preceding paragraph, if the person so acting is responsible for the occurrence of the danger, he is liable to compensate for any injury arising from his act."

have real incentive to improve their capability of reducing risks because this improvement would allow them to engage in higher level of activities without being held liable for damage. This private adjustment of level of capability by definition would be socially more accurate than requirements prescribed by *ex ante* regulations.

6. CONCULUSION

As a civil law system, Taiwan's tort law is an integral part of its Civil Code and even of its whole legal system, including the Criminal Code and administrative laws. This means that the investigation of the compensation for damage in tort law has to be done under a systemic framework.[12] The current standard economic analysis of tort law—the regulatory deterrence-based model—is too narrow for this task. The compensation by the injurer to the injured should not be considered as only an external incentive imposed on the injurer to correct his action.[13] This chapter has shown that this manner of classifying tort liability as a mandatory rule is wrong. The default rule of tort liability is the negligence rule because it benefits both the injurer and the injured by allocating risks Pareto-efficiently. Strict liability is a form of the negligence rule. A unified theory of contractual liability and tort liability emerges. It explains why medical malpractice cannot be a form of product liability. The puzzle of rights *in rem* versus rights in *personam* is also solved quite simply. The limited coverage of insurance and the more stringent requirements of criminal liability are explained. The invisible "Hand" of tort liability, in the sense of Adam Smith's and the Hand formula, has been revealed. The evolution of tort law in Taiwan, of course, is not linear. It is hoped that the economic theory developed in this chapter would shed light on the path travelled and give guidance to the future (Epstein 1997).

REFERENCES IN CHINESE

[12] Richard Posner (2003:250) would criticize this as formalism.

[13] For the critique of seeing law as incentive rather than as norm, see e.g., Buchanan (1974); Mestmäcker (2007). For the worthiness of this approach, see Craswell (2003); Eric Posner (2003).

Cheung, Steven N. S. 2014. *Economic Explanation*. Beijing, China: China CITIC Press.

Chien, Tze-Shiou. 2003. The Presumption of Negligence in Violating Protective Statutes: Economic Analysis and Judicial Misuse. *National Chengchi Law Review* 75: 79-121.

Chien, Tze-Shiou. 2008. Doctor's Malpractice Liability and the Obligation to Disclose. *Cross-Strait Law Review* 22: 38-52.

Chien, Tze-Shiou. 2011. The Problem of Right *in rem* Externality. *Academia Sinica Law Journal* 8: 227-57.

Chien, Tze-Shiou. 2012. For What the Protective Laws Have Been Referred in Tort Law. *Court Case Times* 18: 25-31.

Chien, Tze-Shiou. 2014. Negligence Rules as the Principle of Private Law. *Peking University Law Review* 15 (1): 155-73.

Chien, Tze-Shiou. 2015a. Law as Contractual Arrangements. *SJTU Law Review* 2015 (2): 37-46.

Chien, Tze-Shiou. 2015b. The Contractual Nature of Medical Liability. *Court Case Times* 39: 16-20.

Su, Yeong-chin. 2010. Freedom of Contract on Registrable Goods – Revisiting the principle of numerus clausus in property rights from the perspective of Chinese Civil Law on both sides of Taiwan Strait. *Nanjing University Law Review* 2010 (Autumn): 16-44.

Wang, Tez-chien. 2015. *Tort Law*. Taipei, Taiwan: Author.

REFERENCES IN ENGLISH

Ben-Shahar, Omri and Ariel Porat. 2016. Personalizing Negligence Law. *New York University Law Review*, forthcoming.

Brown, John Prather, 1973. Toward an Economic Theory of Liability. *Journal of*

Legal Studies 2: 323-49.

Buchanan, James M. 1974. Good Economics – Bad Law. *Virginia Law Review* 60: 483-92.

Calabresi, Guido. 1997. Remarks: The Simple Virtues of *the Cathedral, Yale Law Journal* 106: 2201-7.

Calabresi, Guido and A. Douglas Melamed. 1972. Property Rules, Liability Rules and Inalienability: One View of Cathedral, *Harvard Law Review* 95: 1089-128.

Chien, Tze-Shiou. 2013. The Legal Meaning of Coasean Economics. *Peking University Law Journal* 1: 197-214.

Coase, R. H. 1960. The Problem of Social Cost. *Journal of Law and Economics* 3: 1-44.

Coase, R. H. 1988. *The Firm, the Market and the Law*. Chicago, IL: The University of Chicago Press.

Craswell, Richard. 2003. In That Case, What Is the Question? Economics and the Demands of Contract Theory. *Yale Law Journal* 112: 903-24.

Epstein, Richard A. 1997. Law and Economics: Its Glorious Past and Cloudy Future. *University Chicago Law Review* 64: 1167-74.

Fletcher, George P. 1985. A Transaction Theory of Crime? *Columbia Law Review* 85: 921-30.

Geistfeld, Mark A. 2011. The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability, *Yale Law Journal* 121: 142- 93.

Hayek, Friedrich A. 1948. *Individualism* and *Economic Order*. Chicago, IL: The University of Chicago Press.

Holmes, Oliver W. 1881. *The Common Law*. Boston, MA: Little, Brown and Company.

Landes, William M. and Richard A. Posner. 1987. *The Economic Structure of Tort*

Law. Cambridge, MA: Harvard University Press.

Markesinis, Basil S. and Hannes Unberath. 2002. *The German Law of Torts: A Comparative Treatise* (4th ed.). Oxford, UK: Hart Publishing.

Mestmäcker , Ernst-Joachim. 2007. *A Legal Theory without Law: Posner v. Hayek on Economic Analysis of Law*. Tubingen, Germany: Mohr Siebeck.

O'Driscoll Jr., Gerald P. and Mario J. Rizzo. 1996. *The Economics of Time and Ignorance*. London, UK: Routledge.

Posner, Eric A. 2003. Economic Analysis of Contract Law After Three Decades: Success or Failure? *Yale Law Journal* 112: 829-80.

Posner, Richard A. 2003. *Law, Pragmatism, and Democracy*. Cambridge, MA: Harvard University Press.

Shavell, Steven. 1987. *Economic Analysis of Accident Law*. Cambridge, MA: Harvard University Press.

Zimmermann, Reinhard. 2005. *The New German Law of Obligations: Historical and Comparative Perspectives*. Oxford, UK: Oxford University Press.